

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>2/25/2022</u>

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOEL PENA,

Plaintiff,

-against-

ZAZZLE, INC., REDBUBBLE, INC.,
SPREADSHIRT, INC., TP APPAREL, LLC,
and TEESPRING, LLC,

Defendants. :
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21-CV-5819 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on July 7, 2021, Plaintiff Joel Pena, proceeding *pro se*, filed a complaint against Zazzle, Inc., RedBubble, Inc., Spreadshirt, Inc., TP Apparel, LLC, and Teespring, LLC, *see* Compl., Dkt. 1;

WHEREAS on July 21, 2021, the Undersigned referred the case to Magistrate Judge Lehrburger for general pretrial management and for the preparation of reports and recommendations (“R&Rs”) on any dispositive motions, *see* Order, Dkt. 4;

WHEREAS also on July 21, 2021, the Court directed the Clerk of Court to issue summonses as to all Defendants and ordered Plaintiff to serve a summons and the complaint on each Defendant within 90 days of the issuance of the summonses; the Court further directed that, if within those 90 days, Plaintiff did not either serve Defendants or request an extension of time to do so, the Court may dismiss the claims against Defendants under Rules 4 and 41 of the Federal Rules of Civil Procedure for failure to prosecute, *see* Order of Service, Dkt. 3;

WHEREAS Clerk of Court issued summonses as to all Defendants on July 21, 2021, *see* Dkt. 5;

WHEREAS Plaintiff's deadline for effecting service was October 19, 2021;

WHEREAS Plaintiff failed to file any affidavits of service by October 19, 2021;

WHEREAS on November 29, 2021, Judge Lehrburger provided Plaintiff one final opportunity to serve Defendants, ordering Plaintiff to serve the summonses and copies of the complaint on each Defendant by December 20, 2021; the Court further warned that failure to do so would result in dismissal of all claims against the Defendants, *see* Order, Dkt. 7;

WHEREAS Plaintiff failed to file any affidavits of service by December 20, 2021;

WHEREAS on January 13, 2022, Judge Lehrburger ordered Plaintiff to show cause on February 1, 2022 why the case should not be dismissed for failure to prosecute; the Court again warned that failure to appear and show cause would result in dismissal of all claims against the Defendants, *see* Order, Dkt. 8;

WHEREAS Plaintiff failed to appear at the February 1, 2022 hearing, or to otherwise contact the Court;

WHEREAS on February 2, 2022, Judge Lehrburger issued a R&R, recommending that this case be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute, *see* R&R, Dkt. 9 at 2;

WHEREAS in the R&R, Judge Lehrburger notified the parties that, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), they had fourteen days to file written objections to the R&R's findings, *see id.* at 6;

WHEREAS Judge Lehrburger further noted that failure to file objections would result in both the waiver of objections and the preclusion of appellate review, *see id.*;

WHEREAS no objections were filed by either party;

WHEREAS in reviewing an R&R, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge,” 28 U.S.C. § 636(b)(1)(C);

WHEREAS when, as here, no party objects to the R&R, the Court may accept the R&R provided that “there is no clear error on the face of the record,” *Heredia v. Doe*, 473 F. Supp. 2d 462, 463 (S.D.N.Y. 2007) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)); *see also* Fed. R. Civ. P. 72(b) advisory committee’s note;

WHEREAS an error is clear when the reviewing court is left with a “definite and firm conviction that a mistake has been committed,” *see Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (quoting *McAllister v. United States*, 348 U.S. 19, 20 (1954)); and

WHEREAS careful review of the R&R reveals that there is no clear error;

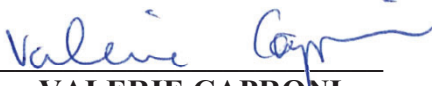
IT IS HEREBY ORDERED that the R&R is adopted in full; this action is DISMISSED without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.

Because the R&R gave the parties adequate warning, *see* R&R at 6, the failure to file any objections to the R&R precludes appellate review of this decision. *See Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”). Because appellate review is precluded, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith, and, therefore, permission to proceed *in forma pauperis* for purposes of appeal is denied.

IT IS FURTHER ORDERED that the Clerk of Court is respectfully directed to close this case. The Clerk of Court is further directed to mail a copy of this Order to the *pro se* Plaintiff at Joel Pena, 60 East 104th Street, Apt. 3E, New York, NY, 10029, and to note mailing on the docket.

SO ORDERED.

Date: February 25, 2022
New York, New York


VALERIE CAPRONI
United States District Judge